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Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1049.

[CONSOLIDATED ACTIONS]

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, *Petitioner,*

vs.

OLGA ZDANOK, *et al.*, *Respondents.*

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, *Petitioner,*

vs.

FRANK T. ALEXANDER, *et al.*, *Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

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I. The *Zdanok* Case.

Respondents make no serious effort to contest the proposition that the Court of Appeals' *Zdanok* decision stands in direct conflict with that of the Sixth Circuit in *Oddie* v. *Ross Gear & Tool Co., Inc.*, 305 F. 2d 143 (6th Cir. 1962), *cert. denied*, 371 U. S. 941 (1962).

It must be emphasized, however, that this conflict did not arise until the first *Zdanok* decision was reconsidered by the Court of Appeals on the second appeal and adopted as federal substantive law.[1]

Respondents' statement that "the first *Zdanok* decision was 'absorbed' as and constituted federal law when that decision was rendered" (Brief in Opp. page 5) is a contradiction in terms and, needless to say, has no basis whatsoever in the decision of the Court of Appeals. It is indeed an exercise in temerity for respondents to make such a claim when both this Court (370 U. S. at 537) and the Court of Appeals (App. page A-23) accepted the prior *Zdanok* decision as one resting on New York contract law rather than applicable federal law. It was on the second *Zdanok* appeal that the Court of Appeals, recognizing its obligation to construe this bargaining agreement as a matter of federal law under this Court's intervening decision in *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962), reconsidered and adopted the prior decision as federal law.

II. The *Alexander* Case.

The principal thrust of respondents' argument in opposition to the petition in *Alexander* is that the Court of Appeals' newly fashioned principles of collateral estoppel present no "novel" or important questions of federal law (Brief in Opp. page 8). Here again, however, respondents refuse to discuss the conflicts created by the decision of the Court of Appeals and simply ignore the tortured process followed by the Court of Appeals to decision in this case.

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[1] As noted before (Pet. page 9), this is why Judge Friendly took care to point out that "the Supreme Court's expressed belief that our ruling rested on state law [a proposition accepted by the Court of Appeals on the second *Zdanok* appeal] deprives the denial of certiorari in *Oddie* of whatever small significance it might otherwise have had." (App. page A-25).

Until the decision of the Court of Appeals in *Alexander* neither this Court nor any Court of Appeals had ever sanctioned, as a matter of federal law, offensive use of a judgment by a stranger to that judgment in a subsequent action against a common defendant. See, e.g., *Keokuk & Western Ry. Co.* v. *Missouri*, 152 U. S. 301, 317 (1894); *Bird* v. *United States*, 241 F. 2d 516 (1st Cir. 1957) and cases cited in the Petitions at pages 17-18. Respondents' attempt to justify the Court of Appeals' departure[2] from this rule on the ground that *Zdanok* was for some unexplained reason a "test case" for the "quiescent" *Alexander* action (Brief in Opp. pp. 3, 8) is without any support in the record of either one of these cases. To resolve this question the Court need look no further than the fact that plaintiffs were being accumulated for and added to the *Alexander* case right up until and after the trial of the case in the district court in 1963. (U. S. D. C. R. pages 776, 1014, 1150).[3]

The havoc the decision of the Court of Appeals will create in enforcement of collective bargaining agreements, some of which cover thousands of employees, each now having individual and enforceable rights against their employer under this Court's *Smith* decision, has already been called to this Court's attention. (Pet. page 20).

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[2] Based upon authorities (also relied upon here by respondents) adhering to the long established rule noted by the same Court of Appeals in *Adriaanse* v. *United States*, 184 F. 2d 968 (2d Cir. 1950), cert. denied, 340 U. S. 932 (1951), but departed from here by the Court of Appeals.

[3] This activity does not comport with the notion adopted by respondents and the Court of Appeals that the *Alexander* case was being held in abeyance pending final disposition of *Zdanok*. It does serve to demonstrate, however, the bandwagon psychology petitioner maintains has been created by the Court of Appeals' abandonment of the mutuality rule. (Pet. page 20). Some of the respondents here, who are now in a position to collect damages against petitioner, were really strangers to *both* actions until shortly before the decision of the Court of Appeals.

Respondents' efforts to explain away the conflicts created by this decision and its consequences as "more imagined than real" (Brief in Opp. page 8) are belied by the facts of their own case.

The second area of conflict created by the decision of the Court of Appeals in *Alexander* resulted from that court's failure to recognize, as this Court and other Courts of Appeals have repeatedly held, that an intervening change of law renders collateral estoppel inapplicable as a matter of federal law. See, e.g., *Commissioner* v. *Sunnen*, 33 U. S. 591 (1948); *Blair* v. *Commissioner*, 300 U. S. 5 (1937); *Parker* v. *Westover*, 221 F. 2d 603 (9th Cir. 1955) and cases cited in Petition pages 23-24. The respondents' refusal to even mention these cases is apparently based on the assumption that further discussion of the decisions will only further demonstrate and sharpen the conflicts created by the unprecedented decision of the Court of Appeals.

Respondents also fail to meet the most anomalous aspect of the *Alexander* case, i.e., that petitioner has been held estopped in this case on the basis of a decision admitted by the Court of Appeals to rest on state law when, under this Court's intervening *Smith* decision, it was entitled to full consideration of its liability as a matter of federal law.[4] The fact that the first *Zdanok* decision was adopted as federal law on the second appeal is immaterial since the

[4] This may explain why respondents maintain in their discussion of the *Zdanok* case that "the first *Zdanok* decision was 'absorbed' as and constituted federal law when that decision was rendered." (Brief in Opp. page 5). This statement, which attributes more error to the decision of the Court of Appeals than even petitioner is willing to assert, hardly deserves any more comment than has already been made. See Part I, *supra*, pages 1 and 2.

estoppel could arise only by virtue of the first *Zdanok* decision.

Nor can it be said that since the first decision has now been adopted as federal law by the Court of Appeals, this problem is one of form rather than substance. The Court of Appeals, by working within the "law of the case" framework of *Zdanok* in its review of the separate *Alexander* action, failed to consider the full range of national labor policies required in this case by *Smith*. By erroneously committing itself to a "clear error" standard of review (App. pages A-27-28), the court necessarily precluded consideration of petitioner's liability in the manner directed by this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957). In short, there can be no better illustration of the necessity for the intervening change of law rule than *Alexander*, where the Court of Appeals' self-imposed limitation on review resulted in a complete frustration of the decision-making processes called for by this Court in *Lincoln Mills* and required in this case by the intervening *Smith* decision.

III. Conclusion.

Rarely have so many clearly established conflicts in so many important areas of the law arisen as in this litigation. Contrary to respondents' suggestions (brief in opp.—page 4), the protracted nature of this litigation has served to increase rather than diminish the importance and number of the federal questions now before this Court. Respondents' refusal to discuss the conflicts which exist in these areas does not lessen the necessity for their resolution in these cases.

For the foregoing reasons and those set forth in the petitions for writs of certiorari, petitioner respectfully submits that the petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated May 11, 1964

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